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No. 87-1097

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OTIS R. BOWEN, Secretary of
Health and Human Services,
Petitioner,

v.

GEORGETOWN UNIVERSITY HOSPITAL, *et al.*,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Pursuant to Rule 35.5 of the Supreme Court Rules, respondents file this supplemental brief to apprise the Court of "late authorities" not available when respondents filed their brief in chief.

1. In Brief for the Respondents ("Brief") at 16, respondents noted that the interpretation of the retroactive corrective adjustments provision presented in the Secretary's brief must be rejected because, among other things, it is inconsistent with the construction in the Secretary's regulations. A recent decision of the Ninth Circuit invalidating another of the Secretary's Medicare interpretations furnishes additional support for the obvious proposition that an agency's interpretations must be consistent with its regulations. *See National Medical Enterprises v. Bowen*, 851 F.2d 291, 293 (9th Cir. 1988) ("A regulation has the force of law; therefore, an

agency's interpretation of a statute in a manner inconsistent with a regulation will not be enforced.").

2. In their Brief at 34, respondents stated: "To date, all nine courts which have considered the issue have refused to allow the Secretary to apply the 1986 malpractice rule retroactively." Respondents have since learned of a tenth court to rule against the Secretary—*St. Mary's Hospital Center v. Bowen*, CCH Medicare and Medicaid Guide ¶ 37,129 (W.D. Wis. April 26, 1988). Respondents are unaware of any courts that have ruled for the Secretary on this issue, and the Secretary has not identified any such cases.

3. In their Brief at 34 n.38, respondents stated: "The instant case, and the litigation involving the Secretary's 1986 retroactive malpractice rule, are part of a much broader pattern of conduct for which the Secretary has earned a well-deserved reputation for 'hardball' litigation tactics, if not for outright abuse of the judicial system." Further examples of this pattern of conduct will be found in two recent Medicare cases—*PIA-Asheville, Inc. v. Bowen*, 850 F.2d 739 (D.C. Cir. 1988), and *Duggan v. Bowen*, CCH Medicare and Medicaid Guide ¶ 37,220 (D.D.C. Aug. 1, 1988).

At issue in *PIA-Asheville* was whether certain depreciation costs were allowable under the Medicare program. In 1985, the D.C. Circuit had rejected the Secretary's policy disallowing these costs, holding that the Medicare statute required reimbursement. The Secretary nonetheless continued to adhere to his original policy, which he codified in a regulation applied on a prospective basis. In *PIA-Asheville*, the court once again rejected the Secretary's policy. It stated *(per* Judge Lawrence Silberman) that "where the basis for rejection of a policy is its repugnance to the statutory scheme it purports to further, regulatory codification is of utterly no significance" and found "no relevant difference" between *PIA-Asheville* and the court's earlier decision against the Secretary. 850 F.2d at 741-742. "Actually," said the court, "we find it somewhat difficult to understand why the Government filed this appeal." *Id.* at 742 n.4.

In *Duggan*, the court *(per* Judge Stanley Sporkin) invalidated as inconsistent with the plain wording of the Medicare statute a policy of the Secretary that sharply limited the number of home health visits to which Medicare beneficiaries are entitled. Although administrative law judges ("ALJs") and the Appeals Council had consistently rejected the Secretary's policy, the Secretary nonetheless continued to apply it to *all* Medicare beneficiaries, even those who had already obtained numerous final favorable decisions on the issue before ALJs or the Appeals Council. With respect to the Secretary's nonacquiescence policy and the hardship it imposed on individual Medicare beneficiaries, the court stated:

> [T]he actions by HHS in the cases presented to me [have] been reprehensible. It is the most blatant form of stonewalling that an agency can engage in and the Secretary should certainly take all steps to prevent this from happening again.

CCH Medicare and Medicaid Guide ¶ 37,220 at 17,781.

Respectfully submitted,

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